REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 394 OF 2021

BOSKY INDUSTRIES LIMITED...........................................APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.........................RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a private company limited by shares duly incorporated on September, 1995 under the companies Act 2015, within the Republic of Kenya and duly authorized to carry out businesses under the name Bosky Industries Limited. The principal business activity of the company is wholesale of ready-made garments.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5 (1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5 (2) with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all the provisions of the written laws as set out in Parts 1 & 2 of the First Schedule to the Act for purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

3. The Respondent carried out an investigation on the Appellant covering the period 2015 to 2016 following which a communication was made of the tax investigation findings in a letter dated 17th April, 2018. The Appellant was
required to provide justifiable grounds why the input VAT and costs claimed by the Appellant in the financial statements from the various businesses should be allowed as claimed.

4. The Appellant gave its Notice of Objection on 24th April, 2018 to the Respondent’s communication on tax investigation findings of 17th April, 2018 giving its reasons for objecting to the tax demand of Kshs. 127,226,618.06.

5. The Respondent through a letter dated 12th June, 2018 confirmed that the letter dated 17th April, 2018 was neither an assessment nor a demand. The grounds of objection were also found unsatisfactory.

6. The Respondent wrote to the Appellant on 13th February, 2019 requesting for supplier records and information in support of the Appellant’s claim for input tax from the following suppliers: - Bashaha Kenya Enterprises, Kenmax Enterprises, Zulma Trading company Limited, Shanlester Enterprises, Swala General Supplies, Kisha Enterprises and Vijarada Enterprises. The said letter requested the Appellant to provide the following documents: -
   a. Supplier statements of accounts showing all invoices and payments,
   b. Certified copies of purchase invoices including ETR receipts,
   c. Certified copies of delivery notes,
   d. Copies of warehouse records including Goods Received Notes,
   e. Records of Stock Movement and sales ledgers,
   f. Payment Vouchers and proof of payment including the copies of Cheque, Cheque stubs or RTGS,
   g. All Bank statements showing moneys drawn to pay the above traders.
7. Upon review of the documents provided, the Appellant was issued with a letter dated 26\textsuperscript{th} June, 2019 informing it that the Respondent had reviewed its findings as a result of which, the initial findings on Corporation tax was vacated and that out of the principal VAT assessed of Kshs. 42,984,336.72, a sum of Kshs. 8,000,000.00 had been received leaving a balance of Kshs. 34,984,336.72.

8. Further to the demand letter sent to the Appellant, the Respondent issued an additional assessment for VAT on 27\textsuperscript{th} May, 2020 totalling Kshs. 46,561,921 for the period between 2015 and 2016.

9. The Appellant objected to the additional assessments between 7\textsuperscript{th} and 11\textsuperscript{th} December, 2020 via the e-filing portal. To support the purchases made, the Appellant claims to have submitted copies of:

   i. Purchases Invoices
   ii. RTGS payment slips
   iii. Bank statements to show payments and receipts
   iv. Electronic tax Receipts (ETR)
   v. Signed delivery notes
   vi. Goods received notes

10. The Appellant lodged an objection to the assessment on 17\textsuperscript{th} December, 2020 via the Respondent’s iTax system but allegedly did not give the reasons for the objection or supply documents in support of the objection.

11. Following several correspondences through email and telephone conversations with the Appellant, the Respondent requested information to affirm the Appellant’s objection.
12. In Response to the request, the Appellant, through its Advocate, sent to the Respondent the following documents:

   a. Purchases Invoices
   b. Sales Invoices
   c. Delivery Notes
   d. Stock Summaries
   e. Proof of Payment for the goods.

13. The Appellant was requested to avail additional records to support the purchases being a letter from the supplier confirming the transaction, records to support the mode of delivery (vehicle registration numbers). Evidence of sales or utilization of the supplies (Goods Received Notes/Stock Movement Register). The requested additional documents were not provided.

14. On 26th May, 2021 the Respondent issued an Objection Decision wherein it rejected the Appellant’s Objection and confirmed VAT assessment totaling Kshs. 46,561,921.00 for the period August 2016.

15. The Appellant, being aggrieved by the decision of the Respondent, lodged a Notice of intention to Appeal the Tribunal dated 24th June, 2021.

**THE APPEAL**

16. The Appellant filed its Memorandum of Appeal dated 5th July, 2021 on 9th July, 2021 and premised its Appeal on the following grounds:

   a) The Respondent erred in fact and law in its Objection Decision dated 26th May 2021 by disallowing purchases invoices amounting to Kshs. 46, 561,921 on the basis that there was no supply of taxable goods made by the suppliers alleged to be missing.
b) The Respondent erred in law and in fact in its Objection decision which is based on inaccurate findings and conclusions that no purchases were made by the third party suppliers when in fact the company, as a matter of fact, engaged in business with the alleged suppliers, has the relevant documentation and has therefore duly complied with all the laid down statutory regulations.

c) The Respondent erred in fact and in law by issuing agency notices dated 23rd February, 2021 before its Objection Decision dated 26th May 2021 contrary to the laid down provisions.

d) The Respondent erred in law and in fact in holding that the advance payments made by the Appellant of Kshs. 8,000,000 was an indication that the Appellant is in Agreement with the Respondent's findings.

e) The Respondent erred in law and in fact in its Objection Decision by outrightly contravening the Doctrine of Legitimate Expectation that rests on the presumption that the Respondent is to follow certain procedures in arriving at the tax liability and the benefits that accrue from it.

f) The Respondent erred in law and in fact in holding that the Appellant never gave documents and evidence to properly support its objection for the disallowed purchases.

g) The alleged non-existence of these suppliers by the Respondent is inaccurate as they are duly registered with the Kenya Revenue Authority.
17. The Appellant therefore prays that:

a. The Respondent's demand for VAT for the period of August 2016 amounting to Kshs. 46,561,921.00 be struck out in its entirety.

b. The Respondent's action to demand additional taxes despite logical and cogent explanations being given to them be declared arbitrary, capricious, unreasonable, unfair and contrary to the administration of Justice and legitimate expectation of the Appellant.

c. The Respondent, its employees, agents/ other persons purporting to act on its behalf be barred and or estopped from demanding or taking any further steps towards enforcement or recovery of principal tax, penalties and interest on the Respondents' demand as stipulated above.

d. Damages for loss of business and embarrassment as a result of the Agency Notices.

e. The cost of this Appeal.

f. Any other remedies that the Honourable Tribunal deems just and reasonable.

THE APPELLANT'S CASE

18. In its Statement of Facts dated 5th July, 2021 and filed on 9th July, 2021, the Appellant states its case as hereunder:

19. The Appellant claims that the Respondent issued an additional assessment for VAT on 27th May, 2020 totaling Kshs. 46,561,921.00.
THE RESPONDENT’S CASE


21. The Respondent relied upon Sections 17 and 43 of the Value Added Tax Act and Sections 28, 29, 51 and 59 of the Tax Procedures Act

22. The Respondent avers that the Appellant's objection did not meet the threshold specified under Section 51 (3) of the Tax Procedures Act. Specifically, the Appellant failed to provide documentary evidence as requested for review hence the confirmation of the assessment. The said Section provides that:

"Section 51 (3) A notice of objection shall be treated as validly lodged by a taxpayer ... if-

a. the Notice of objection states precisely the grounds of objection the amendments required to be made to correct the decision, and the reasons for the amendments

b. In relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

c. all the relevant documents relating to the objection have been submitted."

23. The Appellant did not have the documentation required for review by the Respondent at the time of considering the objection. Upon request, the
Appellant provided none hence, in the circumstances, the objection decision by the Respondent was proper.

24. In view of the foregoing, it is the Respondent's considered view that the additional VAT assessments were raised in conformity with the provisions of the applicable laws and they are due and payable by the Appellant.

The Respondent carried out an investigation on the Appellant covering the period 2014 to 2016 which established that the company claimed VAT on businesses that only exist on paper. The investigation also established that the said businesses only print and sell invoices with ETR receipts to various companies at a commission to reduce their tax liabilities. Furthermore, records at the Registrar of companies revealed that these businesses are owned by only three individuals.

25. In a letter dated 17th April, 2021, the Appellant was required to justify why input VAT claim should be allowed as claimed, within seven days from the date of receipt of the said letter, failure to which, the assessments would be issued.

26. The Appellant objected to the findings in a letter dated 24th April 2018 claiming that the assessment was not factual, was erroneous and was without a basis in law and was inconsistent with the Income Tax Act, Cap 470 of the Laws of Kenya.

27. The Respondent through a letter dated 12th June 2018 pointed out that the letter dated 17th April, 2018 was neither an assessment nor a demand but only required the Appellant to justify the claim for input tax. The grounds of objection were therefore found to be unsatisfactory.
28. The Respondent nevertheless, reviewed the Appellant’s letter dated 12th June, 2018 and documents in support thereof. Vide a letter dated 13th February 2019, the Respondent advised the Appellant to furnish specific records for further review by the Respondent within seven days. A series of meetings between the Respondent culminated in a notice of assessment dated 26th June, 2019 wherein the Respondent assessed the Appellant for VAT amounting to Kshs. 42,984,336.00 out of which sum, the Appellant had prepaid Kshs. 8,000,000.00 However, the assessments were raised in the iTax system between 4th and 7th December 2020 owing to system challenges.

29. The Appellant objected to the assessments between 7th and 11th December 2020 on iTax but gave no reasons for the objection nor documents in support of the objection.


31. The Appellant obtained orders from the Tribunal that lifted the agency notices and was allowed to validate its objection application by furnishing documents to the Respondent.

32. To support the purchases made, the Appellant submitted a copy of an invoice, delivery note, ETR receipt and extract of a bank statement/RTGS as proof of payment.

33. The Appellant was required to avail the following additional records to support the purchases; a letter from the supplier confirming the transaction, records to support the mode of delivery (Vehicle registration numbers), and evidence of sales or utilisation of the supplies (Goods Received Notes/ Stock Movement Register).
34. The assessment was confirmed vide an objection decision dated 26th May, 2021 on the grounds that the Appellant did not have the documentation required for review by the Respondent despite being impressed upon to produce the same.

35. The Respondent claims that the Appellant’s objection did not meet the threshold specified under Section 51 (3) of the Tax Procedures Act. Specifically, the Appellant failed to provide documentary evidence as requested for review hence the confirmation of the assessment. The said Section provides that: -

"Section 51 (3) A notice of objection shall be treated as validly lodged by a taxpayer...if-

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

(c) all the relevant documents relating to the objection have been submitted."

36. The Appellant did not have the documentation required for review by the Respondent at the time of considering the objection. Upon request, the Appellant provided none hence, in the circumstances, the objection decision by the Respondent was proper.
37. At the hearing, the Respondent called one witness Georgeena Kimeu, whose Witness Statement dated and filed on 12th November, 2021 was admitted in evidence and the Witness examined on oath.

38. Subject to the foregoing responses, the Respondent prays the Honourable Tribunal to:

   a. Dismiss the Appeal.


ISSUES FOR DETERMINATION

39. Having carefully studied the parties' pleadings, submissions and all the documents attached to the Appeal, the Tribunal was of the view that the issues for determination could be summarized as follows:

   I. Whether the Appellant is entitled to deduction of input VAT?

   II. Whether the Respondent breached the Appellant's legitimate expectations?

   III. Whether the Appellant is entitled to damages for loss of business and embarrassment as a result of Agency Notices?

ANALYSIS AND FINDINGS

1. Whether the Appellant is entitled to deduction of input VAT
40. The main issue of contention in this Appeal is the disallowed input VAT on purchases that as per the Respondent, did not meet the minimum threshold under the VAT Act.

41. The genesis of the dispute is that the Respondent carried out an investigation on the Appellant covering the period 2015 to 2016 following which a communication was made of the tax investigation findings in a letter dated 17\textsuperscript{th} April, 2018. The Appellant was required to provide justifiable grounds why the input VAT and costs claimed by the Appellant in the financial statements from the various businesses should be allowed as claimed.

42. Following receipt of the Appellant’s objection, the Respondent wrote to the Appellant on 13\textsuperscript{th} February, 2019 requesting supplier records and information in support of the Appellant’s claim for input tax from the following suppliers: - Bashaha Kenya Enterprises, Kenmax Enterprises, Zulma Trading company Limited, Shanlester Enterprises, Swala General Supplies, Kishna Enterprises and Vijarada Enterprises. The said letter requested the Appellant to provide the following documents: -

a. Supplier statements of accounts showing all invoices and payments,

b. Certified copies of purchase invoices including ETR receipts,

c. Certified copies of delivery notes,

d. Copies of warehouse records including Goods Received Notes,

e. Records of Stock Movement and sales ledgers,

f. Payment Vouchers and proof of payment including the copies of Cheque, Cheque stubs or RTGS,

g. All Bank statements showing moneys drawn to pay the above traders.
43. Upon review of the documents provided, the Appellant was issued with a letter dated 26\textsuperscript{th} June, 2019 informing it that the Respondent had reviewed its findings as a result of which, the initial findings on Corporation Tax was vacated and that out of the principal VAT assessed of Kshs. 42,984,336.72 a sum of Kshs. 8,000,000.00 had been received leaving a balance of Kshs. 34,984,336.72.

44. Further to the demand letter sent to the Appellant, the Respondent issued an additional assessment for VAT on 27\textsuperscript{th} May, 2020 totalling Kshs. 46,561,921.00 for the period between 2015 and 2016.

45. The Appellant objected to the additional assessments between 7\textsuperscript{th} and 11\textsuperscript{th} December, 2020 via the e-filing portal. To support the purchases made, the Appellant claims to have submitted copies of: -

a. Purchases Invoices  
b. RTGS payment slips  
c. Bank statements to show payments and receipts  
d. Electronic tax Receipts (ETR)  
e. Signed delivery notes  
f. Goods received notes

46. Following several correspondences through email, and telephone conversations with the Appellant, the Respondent requested information to affirm the Appellant's objection. In Response to the request, the Appellant through its advocate, sent to the Respondent the following documents: -

a. Purchases Invoices  
b. Sales Invoices  
c. Delivery Notes
d. Stock Summaries

e. Bank Statements together with cheque counterfoils as proof of Payment for the goods.

47. The Respondent states that the Appellant was requested to avail additional records to support the purchases being; a letter from the supplier confirming the transaction, records to support the mode of delivery (vehicle registration numbers). Evidence of sales or utilization of the supplies (Goods Received Notes/Stock Movement Register). The requested additional documents were not provided.

48. The Appellant submits that the tax laws provide in Section 17 (3) of the VAT Act, the prescribed documents to be produced while Section 43 (2) of the VAT Act outlines the specific documents to be produced within 5 years.

49. The Respondent stated that the Appellant was identified as one of the beneficiaries of the “Missing Trader Scheme” in which fictitious invoices are generated to depict a business transaction yet there is no actual supply or movement of goods and services. The Respondent further explained that in order to establish the genuineness or otherwise of the claims by the Appellant, it requested the Appellant to provide documents among them; supplier invoices, bank statements, delivery notes, payment vouchers and ETR receipts for purchases from the specific suppliers. The Respondent avers that the Appellant did not provide supporting documents and consequently, it communicated its tax investigations findings to this effect.

50. On its part, the Appellant submitted that it not only incur the input VAT for purposes of making taxable supplies, but it was also issued with tax invoices and ETRs which it furnished the Respondent. The Appellant referred to the
statutory provisions under Section 17 (1) of the VAT Act and Regulation 7 of the VAT Regulations, 2017.

51. Section 30 of the Tax Appeals Tribunal Act places the burden of proof on the taxpayer to submit all the necessary documentation to support its case. The same position was held by the court in Metcash Trading Limited – vs Commissioner for the South African Revenue Service and Another Case CCT 3/2000, where it was stated:

“But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor’s records, returns and averments relating thereto. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner’s precipitating credibility finding can be shown to be wrong, the consequential assessment must stand.”

52. In this case, the Tribunal notes that the Respondent wrote to the Appellant on 13th February 2019 and requested the Appellant to provide documents among them purchase ledgers, stock sheets and payment documents. Further, the Respondent through its witness had submitted that from the invoices
presented by the Appellant, different suppliers had similar ETR serial no. KRA/ETR/P5150... which is irregular as it is impossible for more than one company to share the serial number of its ETR machine with another company.

53. The Respondent avers that the seven companies the Appellant was dealing with were surprisingly owned by three individuals and they existed only on paper. The business premises of these companies as declared on iTax could not be located. Efforts to trace the traders by the Respondent using their declared mobile phones were unsuccessful since they were either out of reach or the owners of the lines were different from the registered names of the proprietors.

54. The Respondent submits that the documents listed under Section 17 (3) of the VAT Act are key in proving that a purchase of a taxable supply has taken place between the Appellant and its suppliers. The Respondent argues that Section 17 (3) of the VAT Act has to be read together with Regulation 9 of the VAT Regulations 2017 in order for it to serve as prima facie evidence of a transaction. However, in the instant case where the Respondent is questioning whether there was an actual supply owing to the fact that the Appellant had been identified as a beneficiary of a missing trader scheme, it was not enough for the Appellant to hold the documentation listed in Section 17 (3) of the VAT Act. The Appellant was also required to prove actual delivery of goods by the invoicing suppliers. The Respondent avers that this position is supported by the Judgement in TAT 159 of 2018; Osho Drapers Limited V Commissioner DTD where the Tribunal held that:

".... for one to claim input VAT, there must be a purchase of a taxable supply. It is not enough to have documentation listed in Section 17 of the VAT Act. The documentation must be supported by
an underlying transaction and the taxpayer must furnish proof that there was an actual purchase."

55. The Respondent submits that, under Section 59 (1) of the Tax Procedures Act read together with Section 43 of the VAT Act, the Respondent may call for any other records and the Appellant has a duty to provide such information. The Section provides: -

"(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to—

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person’s custody or under the person’s control relating to the tax liability of any person;

(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or

(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person."

Consequently, nothing barred the Respondent from requesting for documents of the nature specified in the objection decision to prove the legitimacy of the transactions between the Appellant and its suppliers.

56. The Respondent avers in its submissions that the documents not furnished by the Appellant according to the letter dated 13th February, 2019 are: -
a. Letters from suppliers confirming the transactions
b. Records to support the mode of delivery (Vehicle Registration Numbers)
c. Evidence of sales or utilization of the supplies (goods received notes/stock movement register).
d. Warehouse records showing the Trucks that delivered the goods.

57. The Appellant was required by the Respondent to prove actual delivery of goods by the invoicing suppliers. There must be proof of an actual purchase and confirmation of supply by the Appellant consisting of letters to prove that the suppliers actually exist.

58. The Appellant submits that it supplied the documents in support of the costs incurred for the purchases relating to the same series of transactions under the Corporation tax head and wondered why the same were not used for VAT input tax. The Appellant submits that the argument that documents have not been provided as alleged by the Respondent is misplaced and has no anchor in law. Further, there is no evidence whatsoever that the documents, to wit; vehicle registration numbers and letters from the said missing traders were requested for.

59. However, the Tribunal upon perusal of the objection decision letter dated 26th May, 2021 noted that the said documents were requested at paragraph 5 of the letter which states: -

"In addition to these records, we requested for the following documentations/ information to facilitate the review of the objection:

a. Letters from the suppliers confirming the transactions,"
b. Records to support the mode of delivery (Vehicle registration numbers).

60. The Tribunal therefore disagrees with the Appellant on the assertion that there is no evidence whatsoever that vehicle registration numbers and letters from the said missing traders were requested for. However, the Tribunal notes that the Appellant’s witness submitted that they only keep delivery notes and goods received notes and were therefore not in a position to provide the requested documents.

61. At this point, the Tribunal finds it appropriate to cite the provisions of Section 107 of the Evidence Act which provides that:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Thus, it was upon the Appellant to prove that it indeed purchased the supplies from the listed suppliers.

62. The Tribunal shall analyze the various laws that govern the deduction of Input tax. Section 17(1) of the VAT Act in providing for input VAT claims provides as follows:

> "Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this
section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.”

63. This provision embodies the well-established principle of VAT law that a taxable person who makes transactions in respect of which VAT is deductible may deduct the VAT in respect of the goods or services acquired by him, provided that such goods or services have a direct and immediate link with the output transactions in respect of which the VAT is deductible.

64. The above Sections allow a taxpayer to make deductions of input tax on taxable supplies and for income tax purposes, any expenditure incurred wholly and exclusively in the production of income when assessing the income for any year of income. The above Sections only give one qualification; that the said supplies or expenditure be used for making taxable supplies or wholly and exclusively in the production of income. The Tribunal notes that as per the documents supplied by the Respondent, notably the tax returns, the Appellant lists all purchases made from the seven companies whose existence is disputed.

65. The Tribunal also notes that despite the said companies being disputed as such, the Respondent did proceed to tax output VAT from the said companies as well as Corporation tax while at the same time, failing to totally factor in input VAT as is revealed by the letter dated 17th April 2018. The contents of the letter further reveal that investigations were done that concluded that the suppliers were shell companies, run by three individuals and existed only in name.

66. The Tribunal notes that at the hearing the Respondent’s witness confirmed that the documents requisitioned were delivered including RTGS payment
extracts and delivery notes among other documents. The Tribunal also notes that the letter dated 26th June 2019 shows that the payments to the alleged missing traders were confirmed as per the invoices to the Appellant which were used in determining corporation tax and were allowed as expenses following which, the corporation tax assessment was vacated.

67. **Section 15(I) of the Income Tax Act** states as follows:-

“For the purpose of ascertaining the total income of any person for a year of income there shall, subject to section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income, and where under section 27 of this Act any income of an accounting period ending on some day other than the last day of such year of income is, for the purpose of ascertaining total income for any year of income, taken to be income for any year of income, then such expenditure incurred during such period shall be treated as having been incurred during such year of income.”

The Tribunal is thus at a loss as to why the findings when calculating corporation tax and the findings of the investigation would vary. It would have perhaps been useful if the Appellant and the Tribunal were provided with the relevant details of the investigation report to enable informed decision making.

68. In this regard, the Tribunal refers to the case of **Commissioner of Domestic Services v Galaxy Tools Limited [2021] eKLR** relied on by the Respondent in which it was stated as follows:-
“25. The Court makes these findings aware that the alleged investigation report was not produced in evidence. The Court is alive to the fact that, such investigations and the resultant reports are ordinarily confidential, they may relate to other entities and that if they are produced, they may be highly prejudicial not only to the tax authorities' future investigations but also the entities named therein who may not be participating in the subject proceedings.

26. What is of importance was that, the gist of what concerned the Respondent was communicated to it and was availed to the Tribunal by way of the Statement of Facts. In such circumstances, it is the opinion of this Court that what is required is for the Appellant to give full and sufficient details of the investigation and the outcomes as concerns the particular tax payer sufficient for the tax payer to respond to the allegations. That was done in this case.”

69. The Tribunal has perused the letter dated 13th February 2019 and confirms that the documents requested therein that reasonably would be in the possession of the Appellant were availed. It is absolutely ludicrous for the Respondent to require the Appellant to supply supplier’s documents and records as well as other records which are not documents specified in Section 17 and 43 of the VAT Act. The Tribunal also notes the testimony of the Respondent’s witness who confirmed that the documents that the Appellant submitted were sufficient in accordance with Section 17 of the VAT Act. At Subsections 2 and 3 state as follows:-
“(2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation. Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.

(3) The documentation for the purposes of subsection (2) shall be—

(a). an original tax invoice issued for the supply or a certified copy;

(b). a customs entry duly certified by the proper officer and a receipt for the payment of tax;

(c). a customs receipt and a certificate signed by the proper officer stating the amount of tax paid, in the case of goods purchased from a customs auction; [Rev. 2018] Value Added Tax No. 35 of 2013.

(d). a credit note in the case of input tax deducted under section 16(2); or

(e). a debit note in the case of input tax deducted under section 16(5).”
70. The Tribunal also notes the provisions of *Section 43 of the VAT Act* which states as follows:—

"43. Keeping of records

(1) Every registered person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.

(2) The records to be kept under subsection (1) shall include—

(a) copies of all tax invoices and simplified tax invoices issued in serial number order;

(b) copies of all credit and debit notes issued, in chronological order;

(c) purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;

(d) details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;
(e) tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;

(f) copies of stock records kept periodically as the Commissioner may determine;

(g) details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; and

(h) such other accounts or records as may be specified, in writing, by the Commissioner.

(3) Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorized officer for inspection and shall give the officer every facility necessary to inspect the records.

(4) For the purposes of this section, the Commissioner may, in accordance with the regulations, require any person to use an electronic tax register, of such type and description as may be prescribed, for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of the person.

(5) A person who contravenes any of the provisions of this section commits an offence.”

71. That having been said, the Tribunal is of the view that if the Respondent wanted the records as set out in Section 43, the same ought to have been
communicated with enough specificity to enable the Appellant comply with such directions. No evidence has been availed to show that specific records asked for were not availed. The Tribunal notes that the contents of the letter dated 13th February 2019 as cross-checked with the documents provided under Sections 43 and 17, reveals that all documents that should be availed in law were availed. The documents claimed not to have been supplied in the pleadings of the Respondent though requisitioned, were either not kept by the Appellant or not within the Appellant’s control. It is not enough for the Respondent to claim that the requisite documents were not submitted. The Tribunal is of the view that the documents that were availed were sufficient to enable the Respondent make an informed decision.

72. The Tribunal further reiterates that the contents of the letter dated 17th April 2018 should have been more aptly put down to enable the Appellant better understand the charges set out against it and in that regard what evidence was needed to defend themselves. It is a pertinent, unalienable right that parties be granted a right to be heard. The right to access information is central to the Appellant’s right under the laws of natural justice. Without provision of sufficient information, one would be in no position to ably defend themselves thus hampering the course of justice.

73. The Respondent in response to the submission by the Appellant that the investigation report was never availed to it, submits that the nature of the investigations conducted do not warrant publication and by notifying the Appellant of the investigations and giving it an opportunity to respond, their duty was satisfied. The Tribunal does no agree with this position. The Tribunal is of the view that access to information cannot be done arbitrarily. The Respondent has to give sufficient reasons why and which aspects of the investigations are not fit to be disclosed. The exception given to access to
information deals with information that would pose a risk to the public interest.

74. This position was held in the case of South Initiative for Human Rights Vs Serbia (Application no. 48135/06) quoted in Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission, where it was stated that:

"The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions... The access to information law should, to the extent of any inconsistency, prevail over other legislation... National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who wilfully obstruct access to information..."

75. This position was further reiterated in the case of Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR, in which the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated:

"[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information"
by the state. I therefore agree with the position encapsulated in The Public’s Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.

76. The Respondent has not shown that the nature and extent of the investigation or the contents of the investigation report would in any way be against public interest or that indeed non-disclosure was necessary.

77. On the allegations made by the Respondent that the invoices produced by the Respondents were illegally meant to reduce VAT payments, the Tribunal has perused the documents provided by both parties. The Tribunal notes that the Appellant has provided invoices that contain ETR receipts which are not disputed by the Respondent. The ETR receipts emanate from the Respondent. No documentary evidence has been produced other than the sentiments in the pleadings and oral testimony to show that the documents are either forgeries or part of a fraudulent scheme. Ideally, if the Appellant was committing fraud, it would be prosecuted, no such evidence has been availed. Further, no evidence has been brought to show that the items purchased were never delivered and further if, when and by who the delivery notes, invoices and bank documents were made by and if the same are fake.
78. The Tribunal notes that the powers of the Respondent are vast and they could easily have requisitioned counter documents from the banks in which the deposits by the Appellant were made to confirm whether the transactions indicated are genuine. No evidence has been produced to show that any such due diligence was done. The Respondent could also have easily shown the Tribunal that the suspect suppliers were not active on the iTax system and produced tax records as proof. They also could have easily obtained intelligence records to show who the alleged fraudsters behind the 7 disputed supply companies were. No such evidence was tendered. At the hearing, the witness for the Respondent acknowledged that at the time of the transactions, the impugned companies PIN numbers as well as their names existed in the iTax system.

79. The Respondent also stated that by the Appellant paying a sum of Kshs. 8,000,000.00 the same amounted to an admission of tax liability. We have gone through the documents produced and also acknowledge the testimony of Mr. Rohit Patel, the Appellant's witness, who stated that the sum was paid under duress as the Respondent had threatened to freeze the Appellant's accounts. The witness confirmed that the same was an advance payment which is shown in the payment slips on various dates between February and April 2020.

80. Further, the Respondent’s witness during cross examination in response to a question by the Appellant’s counsel on whether the Pay in slip for the three (3) separate payments of Kshs. 2,000,000.00 indicated taxes were paid for a particular period, VAT being a periodic tax, confirmed that the payments were not for any specific periods and as such cannot be apportioned and be deemed as admission of taxes due.
81. At the point the Appellant submitted the documents in support of purchases, the burden automatically shifted to the Respondent to prove that the documents and/or the transactions were non-existent, this burden of proof was not discharged. **Section 107 of the Evidence Act** Cap 80 Laws of Kenya provides that:-

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

82. The Tribunal wishes to refer to the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where Tunoi, JA. (as he then was) stated as follows:-

> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." (Emphasis ours)

83. This position was further reiterated in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR**, where the court expressed itself as follows:-

> "...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the
Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts." (Emphasis ours)

84. The Tribunal would also like to refer to the case of Maulik Vyas T/A Rocon Enterprises Vs Commissioner of Investigations and Enforcement TAT 22 of 2020 where the Tribunal stated as follows:-

"The Tribunal notes that the Commissioner avers that investigations were done into the investigations of fraud purportedly perpetrated by the Appellant herein. Ideally, the investigating officer should have filed a report in this regard on his findings. That has not been availed to the Tribunal. Practice and common sense dictate the Investigating officer be the Respondent’s star witness in the matter....." (Emphasis Ours)

85. At this stage the Tribunal points out that at the hearing, the witness for the Respondent did not present the investigation report nor was she involved in the investigations.

86. The Tribunal also associates itself with the decision in Commissioner of Investigations and Enforcement Vs Shailesh Jagiiven Dattani ITA E106 of 2020 quoted by the Appellant which states as follows:-

"The court agrees with the Respondent that the Appellant ought to prove investigations and findings/outcome of the investigation to the
Tax Appeal Tribunal and the court to verify the claim or allegation of missing trader fraud in this instance. The burden of proof is on the Appellant in the Appeal and did not shift by virtue of the legal requirement that he who alleges must prove that is housed in Section 107-109 of the Evidence Act. The Appellant in this Appeal claimed fraud and therefore by virtue of the allegation, the burden was on the Appellant to prove it. At this stage, whereas missing traders fraud may exist, in this specific case, it was not proved to be the case; instead the facts is/are insufficient documents to confirm payment of VAT and underlying transaction of purchases made. This would hardly be fraud which requires an ingredient of falsity or deceit which is not here or at least has not been proved.”

87. The Tribunal further agrees with the Appellant that a tax payer is only bound to ensure that a trader is registered on the I-tax system and issues valid ETR Receipts prior to conducting a transaction. The Appellant is not bound to know the inner workings of a trader. It must be stated that the starting point in conducting any due diligence is at the door steps of the Respondent. The Respondent, in its mandate and functions, is bound by the national values and principles of governance under Article 10, the guiding principles of leadership and integrity under chapter six and the values and principles of public service as enshrined under Article 232 of the Constitution of Kenya, 2010.

88. The Tribunal holds and finds that no evidence was adduced to support the allegations of fraud. The Tribunal also holds that the Appellant should have furnished the Appellant with all relevant parts of the investigation report to enable it counter the allegations therein. The Tribunal also holds that the
documents provided by the Appellant were sufficient as per the VAT Act and ought to have been considered by the Respondent.

89. In addition to showing that an Appellant did not conduct reasonable due diligence to establish the credibility of its suppliers, the Respondent has the uphill task of proving that the Appellant was a participant in the fraud in which there was fraudulent claim of input VAT and therefore the pre-existing right of entitlement to deduct input tax may be refused on that basis. It is this claim by the Respondent that forms the basis for issuance of a notice of assessment, which by extension infringes on the right of the Appellant under Article 40 of the Constitution of Kenya. The premise upon which the notice of assessment is based (fraudulent claim of input VAT) must not only be pleaded but must also be particularized and proved. Otherwise the notice of assessment suffers from legal infirmity.

90. We therefore hold and find that the Appellant is eligible for deduction of input VAT as supported by the documentation availed to the Respondent.

II. Whether the Respondent breached the Appellant's legitimate expectations

91. The Appellant states that the Respondent had initially received and allowed the Appellant's expenses claim. The Appellant further stated that the impugned traders held valid PINs and were active on I-Tax database and that was the reason the input tax could be claimed and refunded by the Respondent. The Appellant further stated that the Respondent had been claiming VAT from the impugned traders and as such that was the basis of the claim for input VAT. The taxing of output VAT without deducting input VAT amounts to double taxation if the same is claimed in accordance with
the provisions of tax laws. The Appellant is bound to expect that any input tax that has not been successfully challenged shall be taken into account.

92. The Tribunal associates itself with the sentiments in the judgment in Tax Appeal No. 148 (Consolidated with Appeal No. 344 of 2018) Computech Limited Vs Commissioner of Domestic Taxes, where it was held as follows:

"The evidence placed before us and before the Respondent during the audit fully supports the Appellant's purchases and sales. It also sufficiently supports this appeal on the Appellant's entitlement to a credit refund as per section 17 (1) of the VAT Act, 2013. As such, this Tribunal finds that the right to deduct input tax is an integral part of the VAT scheme and in principle may not be limited. It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs."

93. The Tribunal observes that the Respondent refused and/or failed to avail to the Appellant necessary information that ideally would include relevant portions of the investigation report to enable the Appellant respond to the allegations.

94. The Tribunal wishes to refer to the case of Okiya Omtatah Okoiti v. Attorney General & Another [2020] Eklr, where the court held:

"Once again I observe that a section or sections of a law should not be read in isolation of the other provisions of that law. The impugned provisions are only meant to enforce the tax laws after a tax payer fails to self-assess for tax purposes or once it is evident that
a tax payer is dishonest. The Act as a whole has safeguards that ensures that the taxpayers receive fair administrative action from the tax collector whenever the need arises to put a particular taxpayer through the administrative process”.

95. In Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007]

Ekir the court observed as follows:-

“By rejecting the applicants decision to change the tariff as proposed, the court will be sending out a clear signal that legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the Respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.

An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure
from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality."

96. It is our disposition that the Appellant had legitimate expectations that input tax would be allowed as supported by the documentation availed. The Appellant is eligible for deduction of input tax and the decision by the Respondent to deny the same is unjustified in the circumstances. The Tribunal thus holds that the Respondent breached the Appellant’s legitimate expectation.

III. **Whether the Appellant is entitled to Damages for loss of business and embarrassment as a result of Agency Notices.**

97. Among the orders sought by the Appellant is an order seeking damages for loss of business and embarrassment as a result of the agency notices. The Appellant has not brought any evidence to show that there were losses incurred or damages to its reputation due to the actions of the Respondent. That being said, the Tribunal is aware that its jurisdiction does not extend to issues of damage to reputation and is strictly limited to issues of tax. In that regard the Tribunal declines to award any damages to the Appellant.

**FINAL DECISION**

98. The upshot of the foregoing is that the Appeal is merited and the Tribunal decision accordingly makes the following Orders:-
a. The Appeal be and is hereby allowed.

b. The additional assessment for VAT issued on 27th May, 2020 totaling Kshs. 46,561,921.00 for the period between 2015 and 2016 be and is hereby vacated.

c. That the Respondent to refund the Appellant the sum of Kshs. 8,000,000.00 paid on account.

d. Each Party to bear its own costs.

99. It is so ordered.

DATED and DELIVERED at NAIROBI on this 11th day of March, 2022.

MAHAT SOMANE
CHAIRPERSON

HELEN BILA
MEMBER

WILFRED GICHUKI
MEMBER

JOHN KINYUA
MEMBER

HABON FARAH
MEMBER